

CALIFORNIA STATE MEDIATION AND CONCILIATION SERVICE

In the Matter of the Arbitration)	
Between:)	
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CHULA VISTA ELEMENTARY SCHOOL DISTRICT)	
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Employer,)	
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-and-)	Case No. C.S.M.C.S.
)	ARB-04-2661
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CHULA VISTA EDUCATORS,)	
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Union.)	
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APPEARANCES

ARBITRATOR:	Lionel Richman
FOR THE EMPLOYER:	Jackson Parham, Parham & Rajcic 23195 La Cadena Drive, Suite 103 Laguna Hills, California 92653
FOR THE UNION:	Tim O’Neil, Executive Director California Teachers Association 196 Landis Avenue Chula Vista, California 91910

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This matter was heard before the Arbitrator on April 7, May 24, May 25, and June 15, 2005, at Chula Vista, California. The parties were present and represented. At the conclusion of the hearing, written briefs were filed and the matter is now before the Arbitrator for decision.

INTRODUCTION

The parties have consolidated five grievances for hearing. The Grievants: Robin Donlan, Margaret L. Meyers, Nicki Perez, Stephenie Parker-Petitt, and Victoria Singleton have filed substantively identical grievances. Each claimed violation of Article 33.5 of the Collective Bargaining Agreement which provides:

“Notwithstanding any other provision in the Article, should a determination be made by the Superintendent that an involuntary administrative transfer is reasonably necessary, such transfer may be made by the Superintendent following a conference with the employee.”

At the commencement of the hearing, the Employer made a motion to dismiss. The motion was based upon Article 7.3.7 which provides: “The arbitrator shall have no power to

render an award in any grievance arising before the effective date or after the expiration date of this agreement.” The Agreement further provides that the arbitrator shall not rule on such a motion until after hearing the matter on the merits. Therefore, the arbitrator heard four days of testimony, primarily upon the merits, at which point, the Employer renewed its motion to dismiss. With the agreement of the parties, the Arbitrator determined that it would be appropriate to pass upon the motion first. If the motion were granted, there would be no need to consider the merits. The parties briefed the issue and, on August 18, 2005, the motion to dismiss was denied. The parties were given 30 days to file briefs upon the merits.

At the request of the Employer, the 30-day briefing schedule was suspended so that the Employer could seek judicial relief from the decision of the Arbitrator denying the motion to dismiss.

In due course, the Employer filed suit in the Superior Court, County of San Diego, for mandamus and for declaratory relief, in each case, seeking to vacate the decision of the Arbitrator, that the matter was arbitrable and denying the motion to dismiss. On October 31, 2005, the Employer’s application for judicial relief was denied.

Subsequently, the parties filed written briefs on the merits, the latest brief being received by the Arbitrator on December 7, 2005. The matter is now ripe for decision.

I. STATEMENT OF THE ISSUES

The parties have stated the issues separately. The Union states the issues as follows: Did the Employer violate, misapply, or misinterpret Article 33 of the agreement generally and Article 33.5 of the agreement specifically when it administratively transferred Robin Donlan, Margaret Myers, Nicki Perez, Stephanie Pettit, and Victoria Singleton prior to the start of the 2004-2005 school year, and, if so, what are the appropriate remedies?

The Employer’s statement of the issues is identical to the Union’s statement, except that it does not include the last half sentence relative to remedies.

Subsequently, with a limitation to be set forth, the parties stipulated that the Arbitrator could frame the issues within the parameters of the proposed issues stated by the parties. The Arbitrator selects the Union’s statement of the issues. This stipulation by the Employer is without prejudice to its position that the Arbitrator lacks jurisdiction to decide this matter on the merits and reserves its legal position as stated in its motion to dismiss.

II. RELEVANT CONTRACT PROVISIONS

ARTICLE 33. TRANSFER

33.1 **Definition.** A **transfer** is defined as a change of school or administrative location.

33.5 Notwithstanding any other provision in this article, should a determination be made by the Superintendent that an involuntary administrative transfer is reasonably necessary, such transfer may be made by the Superintendent following a conference with the employee.

III. STATEMENT OF THE EVIDENCE

The five Grievants were long-term teachers at Castle Park Elementary School. In addition to their duties as teachers, each of them served on a number of extra curricular programs. Among these programs on which the Grievants served, from time to time, was the budget committee and the School Site Council.

The School Site Council is the decision-making unit at the school which receives recommendations from other committees, including the budget committee, and then makes overall decisions for the school. It is the decision-making body at the school that includes teachers, certificated employees, the principal, and parents.

The decision of a School Site Council, which involves class organization and expenditure of funds, is presented to the Board of Education. The Board of Education has the power to approve, modify, or reject the decision of the School Site Council.

Castle Park had been plagued by a high turnover in site principals. In fact, Superintendent Billings served, for a period of time, as interim principal. Billings, in his capacity as Superintendent, was dissatisfied with the progress which Castle Park was displaying. He felt the school was in need of a principal who was experienced in turning administration of school programs around.

He recruited Ollie Matos, who had a record of improving performance of schools. Matos commenced employment at the beginning of the 2003-2004 school year. He conducted a review prior to the commencement of the school year and concluded that there were a number of areas that needed improvement. In meeting with the School Site Council, he found that their plan for the school year had already been completed and that they were opposed to making revisions.

He testified that a number of the Grievants, including Donlan, refused to cooperate with the changes which he felt were appropriate. The remaining Grievants were either members of the Council, the Budget Committee, or had served in such positions in the past and had an accepted role of leadership with other teachers.

Finally, in August of 2004, Matos met with Billings and recommended the transfer of the Grievants from Castle Park. In addition to the Grievants, he recommended the transfer of Denmon and Teri Coffey. However, the latter two were not transferred. He requested these transfers because he felt the individuals named showed a lack of respect for him and unprofessional behavior; and noncohesiveness with the staff. He felt they were unwilling to work together as a team with him.

Teachers are evaluated every two years. Matos had occasion to evaluate Singleton. On the evaluation form she was rated highly. Under the heading "Overall Evaluation Summary Statement," he had written, in part, "She always works cooperatively with her team members, other staff and myself." From the time of that evaluation until the time he requested her transfer, he never brought to her attention any concern regarding her alleged unprofessional behavior, lack of cohesiveness with other staff members, or unwillingness to work as a team member.

He also evaluated Grievant Perez. Under the heading "Overall Evaluation Summary Statement," he stated, in part, "She always works cooperatively with her team members and other staff and myself." Between the time of that evaluation and the time he recommended her transfer, he never brought to her attention any lack of respect, or unprofessional behavior or noncohesiveness with staff or unwillingness to work as a team member.

He evaluated Grievant Myers and, under the heading of the Summary Evaluation, he wrote that Grievant maintained a professional demeanor at all times and concluded by saying, "It is a pleasure to have a high quality teacher like Ms. Myers working with children on a daily basis."

From the date of that evaluation until the date he recommended her transfer, he never communicated to her any concerns with regard to her behavior, lack of respect, unprofessional behavior, or noncohesiveness with staff or unwillingness to work as a team player.

Nothing happened specifically, between the time of these evaluations and the time he recommended their transfer, that led him to the conclusion that they needed to be transferred. It was based upon his conclusion that the school improvement program was not going to be moving forward as long as they were there. The significant event, from his point of view, was that the priority list had come out and, when he looked at student data and where school funds were going, it appeared that the plan would remain the same, even though things had changed. They were still going to have the same programs year after year. Matos took his problems to Billings on a number of occasions. At about the time Billings determined to effect the transfers, he had received the results of the Harris Interactive Survey. The Survey is used by more than 200 school districts and serves as a "customer satisfaction" survey for schools. Dr. Doyle, who initiated the survey, added certain questions which targeted Castle Park. He was asked to do

this by Billings. The survey reflected staff and community support for Matos which led Billings to conclude that Matos was not the reason change had failed to occur at Castle Park.

Once he reached this conclusion, he determined, to effect the transfer under 33.5 of the Collective Bargaining Agreement.

Article 33 is an extensive article dealing with transfers both voluntary and involuntary. Each of the Grievants was invited to his office separately accompanied by a Union representative and each was advised of Billings' intent to transfer such Grievant away from Castle Park. When asked for the reason, Billings responded, "It's in the best interests of the education program." When pressed as to what the Grievant's failings were that called for a transfer, Billings responded, "It's in the best interests of the education program." Each Grievant was furnished with a written letter, which had been prepared prior to their meeting with Billings, which stated, in relevant part, as follows: "As we discussed in our conference, this transfer is in the best interests of the educational program and students."

Billings, himself, testified that this was his statement at the meeting with each of the Grievants and that this was his response at each meeting when further information was sought. At the meeting with Donlan, the Union representative asked him to elaborate and his response was "in the best interest of the educational program." This was the only reason he gave.

Each Grievant was assigned to a new teaching position at different schools for the 2004-2005 school year.

IV. DISCUSSION

The Union has offered evidence of pre-contract negotiations leading to the adoption of 33.5.

Bargaining history and pre-contract negotiations are valuable and proper sources from which to ascertain the meaning of contract language if the contract language is subject to more than one meaning. What is significant is the give and take across the bargaining table and the manifestation by the parties of their goals in making contract presentations. The subjective intent of one of the parties not manifested during bargaining is not helpful in interpreting an ambiguous contract provision. Thus, the testimony of Insko, regarding the Union's intent in bargaining for a change in the preexisting contract language, is unavailing since evidence of the Union's intent, without a manifestation of that intent, adds no substance to the understanding of the parties. Insko testified that the Union's goal on this occasion was to permit the Superintendent to initiate a transfer, but it would have to be reasonably necessary in order to do so.

The intent manifested by the parties to each other during negotiations by their communications and their respective proposals – rather than undisclosed understandings and impressions – may be considered in determining the meaning of contract language. (*Kahn's and Co.*, 83 LA 1225, 1230, citing Elkouri and Elkouri, *How Arbitration Works*, at page 314 (3rd Edition, 1973.)

It must be emphasized, however, that bargaining history is appropriate to interpret a contract provision which is not clear upon its face. Where the contract provision is clear and unambiguous, bargaining history will be rejected to interpret such clear and unambiguous language. (*Plain Dealer Publishing Company*, 104 LA 919.) The Union argues that finding Article 33.5 stands alone would, in effect, be inconsistent with the balance of Article 33 and would constitute a waiver of the requirements contained in 33.4.1.

Article 33, dealing with transfers, is lengthy and detailed. A good portion is administrative in function. That is, it deals with voluntary transfers, transfers during the school year, requests for transfers and the administrative determination of transfers to particular positions.

Specifically, the Union targets 33.4.1 as a provision which would be written out of the contract if Article 33.5 were interpreted “as an absolute waiver of the requirements contained in Article 33.4.1.” The Arbitrator disagrees. 33.4.1 (a) deals with a request by the immediate supervisor to transfer an employee and the procedure to be followed. 33.5, on the other hand, deals with the authority of the superintendent to make an involuntary administrative transfer. There is no inconsistency in holding that 33.5 vests an absolute right in the Superintendent to effect an involuntary administrative transfer so long as the requirements of 33.5 are adhered to.

The Arbitrator concludes that 33.5 consists of two elements. The first element is a determination by the Superintendent that an involuntary administrative transfer is reasonably necessary. The word “reasonably” raises the question as to whether the Arbitrator should independently determine from the record whether the determination, in the instant cases, was “reasonably necessary.” Here, we do turn to 33.4 for assistance. 33.4.1 deals with a transfer request initiated by the immediate supervisor of the employee. 33.4.1 (a) requires that the supervisor believe that the “best interest of the students, the district, and then the employee will be served by the change in assignments for that particular employee.” Subsection (b) requires that the employee be advised through a personal interview of the reason(s) why an administrative transfer is being recommended. The distinction between 33.4.1 (a) and (b) and 33.5 would appear to indicate that, while the decision of a supervisor may be reviewed by an Arbitrator for reasonableness, he has no such authority under 33.5. This conclusion is not wholly illogical. To make the reasonableness of the Superintendent’s decision reviewable by an arbitrator, would permit the arbitrator, unacquainted with the school district, the school, the student body, and the community, to make decisions best made by an expert in the field. Assuming, without deciding, that such a decision is reviewable for reasonableness, the testimony of Dr. Billings and Dr. Doyle, would appear to satisfy the test of reasonableness.

We then proceed to the second element of 33.5.

The second element is in the form of a condition precedent, that the transfer be made “following a conference with the employee.”

As the Arbitrator sees it, once the requirement for a conference is met, the Arbitrator is without jurisdiction to question the basis articulated by the Superintendent for the transfer.

The issue, then, is did the Superintendent have a conference with the Grievants prior to effecting the transfer?

Merriam-Webster’s Collegiate Dictionary defines “conference” as “a meeting of two or more persons for discussing matters of common concern: a formal interchange of views.”

American Heritage of the English Language defines “conference” as “A meeting or consultation or discussion: An exchange of views.”

Webster’s Seventh New Collegiate Dictionary defines conference as “a usu[sic] formal interchange of views.”

In the instant case, the testimony of the Grievants and of Dr. Billings is uniform. As to each Grievant, when the meeting with Dr. Billings took place, he stated that the transfer was in the best interest of the educational program. When pressed for specific reasons or facts or information, he responded by repeating, “It is in the best interest of the educational program.”

As Dr. Billings testified, he was only required to meet with the employee. He was not required to have a dialogue or a discussion nor was he required to provide any reasons for which the employee was to be transferred.

The contract does not support the concept that the Superintendent could repeat, as a mantra, “It is in the best interests of the educational program,” and thus discharge his obligation under 33.5. This was not a “conference” as that word is defined, but a unilateral ukase.. The Arbitrator concludes that the second element of 33.5 was not adhered to and that the involuntary administrative transfer violated 33.5 of the Collective Bargaining Agreement.

V. THE PROPOSED REMEDY

The Union seeks certain monetary damages for each of the Grievants. The Arbitrator considers it appropriate not to pass on these individual issues at this time, as he indicated at page 115:6-15 of the transcript. At that time, the Arbitrator sustained an objection to a question to Donlan relative to the special ed stipend, indicating that, if the parties reached that point, the Union would have an opportunity to show specific injury to specific Grievants.

As to the basic issue, the Arbitrator feels that a tailored, make-whole remedy is appropriate. This would include returning the Grievants to Castle Park Elementary School. However, merely making such an order, would be almost an exercise in futility since the Superintendent could then call the Grievants into his office immediately upon the receipt of this award and, one by one, tell them why he had made the decision to administratively transfer them, leaving the Grievants back at square one.

The Arbitrator feels that a breathing spell, which would have the effect of dissipating the violation of the Collective Bargaining Agreement, would be appropriate.

V. AWARD

The Grievances are sustained. Each Grievant is entitled to reinstatement to the positions which they held at Castle Park School prior to their transfer commencing with the next semester. Further, the provisions of 33.5 may not be invoked by the Superintendent until the end of the next school year following each Grievant's reinstatement at Castle Park.

The Arbitrator leaves to the parties the question of monetary loss, if any, sustained by the Grievants by reason of the violation of 33.5. If the parties are unable to reach agreement, the Arbitrator retains jurisdiction to conduct further hearings, to hear evidence of such claimed monetary losses and to make an award thereon.

Dated this twenty-first day of December, 2005

Lionel Richman, Arbitrator